

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of September, two thousand six.

PRESENT: HON. ROGER J. MINER,
HON. DENNIS JACOBS,
HON. CHESTER J. STRAUB,
Circuit Judges.

- - - - -X
SHU QIN CHEN,

Petitioner,

-v.-

04-6525-ag

ALBERTO R. GONZALES,* U.S.
DEPARTMENT OF HOMELAND SECURITY,

Respondent.

- - - - -X

*Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as respondent in this case.

APPEARING FOR PETITIONER: WEI JIA, Boston, MA

APPEARING FOR RESPONDENT: ROBERT WILLIAM YALEN,
Assistant United States
Attorney (Michael J. Garcia,
United States Attorney for the
Southern District of New York,
on the brief, Sarah S.
Normand, Assistant United
States Attorney, of counsel),
New York, NY.

Petition for review of a final decision of the Board
of Immigration Appeals.

**UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND
DECREED** that the petition for review is hereby **DISMISSED**.

Shu Qin Chen petitions for review of the decision of
the Board of Immigration Appeals ("BIA"), denying as
untimely his motion to reopen the removal proceedings,
notwithstanding Chen's allegation that the untimeliness
was caused by ineffective assistance of counsel. We
assume familiarity with the facts, the procedural
history, and the issues on appeal.

The BIA's denial of a motion to reopen is reviewed
for an abuse of discretion. Guan v. Board of Immigration
Appeals, 345 F.3d 47, 48 (2d Cir. 2003).

Under Matter of Lozada, 19 I. & N. Dec. 637 (1988),
an immigration petitioner alleging ineffective assistance
of counsel must [i] file an affidavit detailing the
agreement with counsel and counsel's failure to perform;
[ii] give counsel the opportunity to respond to the
allegations; and [iii] file a complaint with the relevant
disciplinary authorities or explain why no such filing
was made. "[A]n alien who has failed to comply
substantially with the Lozada requirements in her motion
to reopen before the BIA forfeits her ineffective
assistance of counsel claim in this Court." Jian Yun
Zheng v. United States DOJ, 409 F.3d 43, 47 (2d Cir.
2005).

The BIA did not abuse its discretion in denying the motion to reopen. While Chen alleged that he was unable to fulfill Lozada because he had been given a brief interval to file the motion, Chen failed thereafter to [i] alert the BIA to any efforts he was making to comply with the Lozada or [ii] supplement his motion to reopen with Lozada documentation in the intervening six weeks before the BIA ruled. This Court cannot consider the validity of Chen's claim in the first instance because the very purpose of Lozada is to ensure a complete administrative record. Lozada, 19 I. & N. Dec. at 639.

If Chen's account of the facts and circumstances are accurate and credited, it is possible that, even now, he could file a second motion to reopen to reflect compliance or efforts to comply with Lozada, subject to applicable procedural limitations. See 8 C.F.R. § 1003.2; BIA Prac. Man. Ch. 5.6. It is to be expected that such a submission would be afforded due consideration.

We have considered all of Chen's remaining arguments and find them to be without merit. For the foregoing reasons, we dismiss the petition for review.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

Richard Alcantara, Deputy Clerk